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No.

IN THE

Supreme Court of the United States

ANDREW G. SHANK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of equitable tolling permits a district court to decide a timely filed motion to correct illegal sentence under Federal Rule of Criminal Procedure 35(c) more than seven days after imposing sentence, where the district court purported to exercise jurisdiction by setting the matter for a hearing and the government acquiesced in the court's adjudication.

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PETITION FOR A WRIT OF CERTIORARI

Andrew G. Shank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 395 F.3d 466 (4th Cir. 2005). The order of the district court denying petitioner's Rule 35(c) motion (App., *infra*, 9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

The 1991 version of Federal Rule of Criminal Procedure 35(c) provided:

> **Correction of Sentence by Sentencing Court.** The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Fed. R. Crim. P. 35(c) (2002).

STATEMENT

This case concerns whether principles of equitable tolling permit appeal of the denial of a timely filed motion under Federal Rule of Criminal Procedure 35(c) to correct an illegal sentence where the district court rules more than seven days after imposing sentence. The court of appeals concluded that a district court must dispose of such a motion within seven days and that, absent action by the district court, a defendant must deem the motion denied. The court of appeals further concluded that principles of equitable tolling do not apply to Rule 35(c) motions, even where the district court schedules a hearing and rules on the motion outside the seven-day window and where the government fails contemporaneously to object to the district court's disposition.

1. On February 4, 2002, petitioner Andrew G. Shank pled guilty to one count of bank fraud, in violation of 18 U.S.C. § 1344. App., *infra*, 2a. In his plea agreement with the United States Attorney's office, petitioner stipulated to some of the facts relevant under the then-binding United States Sentencing Guidelines. *Ibid.* The plea agreement specifically noted that other facts—most importantly, the amount of loss attributable to a particular loan transaction—were in dispute. *Ibid.*

On June 25, 2002, the district court held a hearing on those contested items. App., *infra*, 2a. With respect to the amount-of-loss issue, the district court heard testimony

from a vice president of the bank that made the loan that was principally at issue. The vice president testified that petitioner was responsible for a loan with a balance of $368,207 and that the bank had reclaimed the building that had served as collateral for the loan. According to the vice president, the bank then ordered an appraisal of the building, which established its value at $425,000 (approximately $57,000 more than the loan balance). The vice president nonetheless maintained that the bank suffered a loss of about $350,000 because the bank ultimately elected to donate the building for tax purposes rather than sell it. Over petitioner's objection, the district court adopted the vice president's loss figure (with one small adjustment) and increased petitioner's offense level accordingly. The district court then sentenced petitioner to 41 months' imprisonment and ordered restitution in the amount of $822,000. *Id.* at 10a-15a.

2. On July 3, 2002, petitioner filed a Motion to Correct Illegal Sentence pursuant to Federal Rule of Criminal Procedure 35(c). App., *infra*, 2a. That rule provided, in relevant part, that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c) (2002).[1] Pursuant to Federal Rule of Criminal Procedure 45(a)(2) ("Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days."), the motion was timely filed. Petitioner's Rule 35 motion argued, *inter alia*, that the district court had clearly erred in accepting the $350,000 loss figure attributable to the loan disputed at sentencing, because the bank received collateral valued in excess of the

[1] Unless otherwise indicated, all references are to the Rules in effect at the time petitioner was sentenced in June 2002. In 2004, the 1991 version of Rule 35 was amended to slightly rephrase subsection (c) and to relocate it to subsection (a).

outstanding loan balance and accepted that collateral in full satisfaction of the loan. See *id.* at 16a-18a, 21a-23a.

The government filed a response to petitioner's motion on July 5, 2002. The government opposed the substance of petitioner's motion but did not argue that the court lacked authority to decide the matter upon expiration the seven-day period. Petitioner filed additional memoranda in support of his motion, and the district court set the matter for a hearing on November 1, 2002—some four months after sentence was imposed. At that hearing, petitioner again argued that the district court had miscalculated the loss attributable to the disputed loan transaction. App., *infra*, 16a-18a, 21a-23a. The government argued to the contrary, but at no point did it claim that the court lacked authority to decide the Rule 35 motion. *Id.* at 18a-21a. Nor did the district court question its authority. At the conclusion of the hearing, the district court denied the motion, reasoning that the court had not committed an "arithmetical mistake" and that relief therefore was not available under Rule 35. *Id.* at 23a.

On November 8, 2002, petitioner filed a notice of appeal from the district court's denial of the Rule 35 motion. App., *infra*, 25a.[2] Over the next year, petitioner (at times proceeding *pro se*) and the government litigated a variety issues in the district court (*e.g.*, production of grand jury testimony) and the court of appeals (*e.g.*, plea agreement appeal waiver). The government did not argue that the district court lacked authority to decide the Rule 35(c) motion more than seven days after sentence was imposed.

The court of appeals appointed the undersigned counsel to represent petitioner on April 13, 2004. Petitioner's opening brief in the court of appeals argued that the plea

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[2] To be clear, petitioner's notice of appeal referred specifically to the denial of the Rule 35(c) motion and not to the underlying judgments of conviction or sentence. App., *infra*, 25a.

agreement had expressly preserved appellant's right to file a Rule 35 motion and to appeal its denial and that petitioner had properly perfected his appeal. Aplt. C.A. Br. 9-10. Petitioner further argued that his sentence violated this Court's recent decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), because his prison sentence was enhanced by judicial factfinding under a preponderance of the evidence standard. *Id.* at 10-21. Petitioner acknowledged that the plain error standard would apply to his *Blakely* claim. *Ibid.*

In response, the United States argued for the first time that petitioner's appeal was time-barred because "[a] district court lacks subject matter jurisdiction to correct a sentence [under Rule 35(c)] after the expiration of seven days * * * ." Aple. C.A. Br. 6. If the district court lacked jurisdiction when it ruled on the motion, the United States reasoned, petitioner's notice of appeal from that ruling must be untimely. *Id.* at 6-7. The United States also argued that petitioner's Rule 35(c) motion did not concern an "arithmetical, technical, or other clear error," *id.* at 3-6; that petitioner waived his right to appeal in the plea agreement, *id.* at 8-11; that *Blakely* did not apply to this case or to the United States Sentencing Guidelines generally, *id.* at 11-21; and that, even if *Blakely* did apply, petitioner did not satisfy the plain error standard, *id.* at 21-24.

In reply, petitioner argued that a timely filed Rule 35(c) motion vested the district court with jurisdiction to decide the matter. Aple. C.A. Reply 1-2. Petitioner also argued that, even if Rule 35(c) could be construed to create a seven-day jurisdictional window within which the district court must act, principles of equitable tolling would apply under these circumstances. *Id.* at 3-5. Relying on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and its progeny, petitioner argued that the district court's decision to set the Rule 35(c) motion for a hearing several months after filing, the government's failure to raise the issue until

more than two years later, and the absence of Fourth Circuit case law on point warranted equitable tolling.[3] *Ibid.*

The court of appeals dismissed the appeal, holding that the district court lacked jurisdiction to decide petitioner's Rule 35(c) motion more than seven days after imposing sentence. App., *infra*, 1a-2a. The court of appeals found that "the plain language of the rule * * * makes clear that the court must act within seven days of sentencing, and that a timely motion by the defendant does not extend this period." *Id.* at 4a. The court of appeals emphasized that the Rule refers to action by "the court" and does not "contemplate or require" "a motion by a party." *Ibid.* The court of appeals also noted that a Rule 35 motion was not among those listed in Federal Rule of Appellate Procedure (4)(b) that expressly toll the 10-day period for filing a notice of appeal from a judgment of conviction. *Id.* at 5a.[4] The court of appeals then stated that "the vast majority of our sister circuits have specifically rejected [petitioner's] view, instead holding, as we do, that the rule clearly imposes a seven-day jurisdictional limit." *Id.* at 6a (citing *United States* v. *Wisch*, 275 F.3d 620, 626 (7th Cir. 2001); *United States* v. *Austin*, 217 F.3d 595, 598 (8th Cir. 2000); *United*

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[3] Petitioner's reply brief also responded to the other arguments raised by the government, none of which is at issue here. Prior to oral argument, the court of appeals ordered supplemental briefing on whether the district judge should have recused himself under 28 U.S.C. § 455 because his brother-in-law was an executive at the bank involved in the disputed loan transaction and because the judge's wife owned stock in that bank. Because the court of appeals dismissed this appeal on jurisdictional grounds, it did not reach that question.

[4] The court of appeals also observed that "[t]he 2002 amendments to the rule clarified that this omission was intentional—for newly amended Rule 4(b) provides: 'The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.' Fed. R. App. P. 4(b)(5) (2004)." App. *infra*, 5a.

States v. *Morrison*, 204 F.3d 1091, 1092 (11th Cir. 2000); *United States* v. *Barragan-Mendoza*, 174 F.3d 1024, 1030 (9th Cir. 1999); *United States* v. *Blackwell*, 81 F.3d 945, 948 & n.4 (10th Cir. 1996); *United States* v. *Lopez*, 26 F.3d 512, 519 n.8 (5th Cir. 1994); *United States* v. *Morillo*, 8 F.3d 864, 869 (1st Cir. 1993)). The court of appeals noted two contrary decisions "arguably adopting [petitioner's] position," but it found those decisions were "undermine[d]" by "the 2002 amendments to Fed. R. App. P. 4(b)." App., *infra*, 7a n.4 (citing *United States* v. *Carbuche*, 138 F.3d 1014, 1016 (5th Cir. 1998); *United States* v. *Corey*, 999 F.2d 493, 496 (10th Cir. 1993)).

In a footnote, the court of appeals rejected petitioner's alternative argument that equitable tolling principles should suspend the seven-day jurisdictional window where both the district court and the government proceeded as if jurisdiction were proper. App., *infra*, 8a n.6. Labeling petitioner's argument "frivolous," the court of appeals held that "*Irwin* provides no authority for application of applicable tolling here." *Ibid.* The court of appeals read *Irwin* as "*reject[ing]* the petitioner's claim that [the] filing requirement [under 42 U.S.C. § 2000e-16(c)] had been equitably tolled." *Ibid.* "[J]ust as important," the court of appeals concluded, "equitable tolling principles cannot, and do not, work to impose responsibility on the district court for [petitioner's] failure to preserve his legal rights." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' categorical refusal to examine whether equitable tolling principles extended the district court's jurisdiction over the Rule 35(c) motion and thereby rendered petitioner's notice of appeal timely conflicts with settled decisions of this Court. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1991), the Court held that a rebuttable presumption exists in favor of the availability of equitable tolling, even with respect to jurisdictional limits in

suits against the government. The court of appeals here reversed that presumption by failing even to consider whether the circumstances giving rise to petitioner's belief that Rule 35(c)'s seven-day period was not jurisdictional would warrant relief. Those circumstances—including the district court's purporting to retain jurisdiction over the matter, the government's continued acquiescence in the adjudication, and the absence of Fourth Circuit precedent on point—would warrant tolling of Rule 35(c)'s seven-day period under longstanding decisions of this Court.

A. The Court of Appeals' Decision Ignores *Irwin*'s Rebuttable Presumption In Favor Of Equitable Tolling

The court of appeals' wholesale rejection of petitioner's claim for equitable tolling is inconsistent with this Court's holding in *Irwin* and its progeny that equitable tolling is presumptively available, assuming the party otherwise meets the doctrine's requirements. In *Irwin*, this Court "granted certiorari to determine when the 30-day period under [42 U.S.C.] § 2000e-16(c) begins to run and * * * whether late-filed claims are jurisdictionally barred." 498 U.S. at 92. Because the Court answered the first question by holding that the period began to run when Irwin's attorney first received the right-to-sue notice, Irwin's complaint was untimely. Turning to the second question, the Court reviewed the court of appeals' determination that equitable tolling was not available because "the filing period contained in § 2000e-16(c) is jurisdictional." *Id.* at 93. The Court squarely rejected that conclusion, noting that the availability of equitable tolling "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at 95. The Court "therefore h[e]ld that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 96.

The Court next examined whether principles of equitable tolling would warrant relief under the particular circumstances of that case. The Court observed that tolling is typically granted "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Ibid.* (footnotes omitted). The Court ultimately found Irwin's claimed excuse—that his lawyer had been "absent from his office at the time that the EEOC notice was received"—represented only "a garden variety claim of excusable neglect" and did not warrant tolling. *Ibid.*

Subsequent decisions of this Court have recognized that, although the circumstances presented in *Irwin* did not ultimately warrant relief, that case stands for the larger principle that equitable tolling is presumptively available under even the most restrictive circumstances. See, *e.g.*, *Scarborough* v. *Principi*, 124 S. Ct. 1856, 1869 & n.8 (2004) ("Although we held [in *Irwin*] that equitable tolling could be applied in Title VII claims against the Government, we further determined that the doctrine's requirements were not met on the specific facts of [that case]."); *Raygor* v. *Regents of the Univ. of Minnesota*, 534 U.S. 533, 543 (2002) ("In suits against the United States, * * * there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity.") (citing *Irwin*). Moreover, the Court has noted that *Irwin*'s description of the particular circumstances warranting equitable tolling is not exhaustive. See *Young* v. *United States*, 535 U.S. 43, 50 (2002) (tolling three-year lookback period for discharging selected tax liabilities under 11 U.S.C. § 507(a)(8)(A)(i)); *ibid.* ("We have acknowledged * * * that tolling might be appropriate in other cases, see, *e.g.*, *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (*per curiam*), and this, we believe, is one.").

Here, the court of appeals' reading of *Irwin* and its progeny was exactly backward. In dismissing petitioner's claim for equitable tolling as "frivolous," the court of appeals explained that "*Irwin* considered the filing requirement of an inapposite provision of federal law * * * and *rejected* the petitioner's claim that this filing requirement had been equitably tolled." App., *infra*, 8a n.6. The court of appeals did not discuss *Irwin*'s holding establishing a rebuttable presumption in favor of equitable tolling, nor did the court of appeals attempt to determine whether there was any evidence indicating that Rule 35(c) would not fall within that general rule.

Indeed, Rule 35 is decidedly unlike the sort of complex provisions that typically foreclose the availability of equitable tolling. See, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 350 (1996) (recognizing that *Irwin* requires courts to ask whether "there is good reason to believe that Congress did *not* want the equitable tolling doctrine to apply," and concluding that 26 U.S.C. § 6511 "sets forth its limitations in a highly detailed technical manner that, linguistically speaking, cannot easily be read as containing implicit exceptions"); cf. *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) ("The [Quiet Title Act, 28 U.S.C. § 2409a,] by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling.") (citing *Irwin*, 498 U.S. at 96). And this Court has recently upheld the district court's inherent authority to toll the one-year limitations period under 28 U.S.C. § 2244 with respect to unexhausted claims included in "mixed" federal habeas petitions, when doing so would be consistent with the overall purposes of the Antiterrorism and Effective Death Penalty Act of 1996. *Rhines* v. *Weber*, 125 S. Ct. 1528, 1535 (2005). The finality interests served by § 2244 are no less significant than those that Rule 35(c) promotes, and it is difficult to see why tolling would be

available with respect to the former but categorically barred with respect to the latter.

The court of appeals summarily rejected petitioner's claim that he was misled by the district court and the government into believing that the district court retained jurisdiction to decide his timely filed Rule 35(c) motion. The court of appeals simply ignored *Irwin*'s instructions to presume that equitable tolling is generally available and to consider whether the particular facts and circumstances of this case warranted relief. This Court's intervention is necessary to correct the Fourth Circuit's severe misapprehension of *Irwin* and the resulting impairment of the equitable tolling doctrine.

B. If Properly Applied Here, Principles Of Equitable Tolling Would Render Petitioner's Notice Of Appeal Timely

Under the facts of this case, the equitable tolling doctrine would extend the district court's jurisdiction to decide petitioner's Rule 35(c) motion and render petitioner's appeal timely. Indeed, the court of appeals' characterization of petitioner's equitable tolling claim as "frivolous," App., *infra*, 8a n.6, is particularly troubling in light of this Court's decisions recognizing that parties generally should not be penalized for relying on a district court's erroneous assurances as to its authority.

In *Carlisle* v. *United States*, 517 U.S. 416 (1996), the Court considered a defendant's claim that the district court had authority to grant an *untimely* motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Although the Court ultimately concluded that the district court lacked such authority, the Court acknowledged that the result might be otherwise if the district court had mistakenly assured the defendant it was acting properly. *Id.* at 428 (citing *Thompson* v. *INS*, 375 U.S. 384 (1964) (*per curiam*)); see *ibid.* ("*Thompson* * * * expressly relied on

the unique circumstances that the cause of the failure to meet the Rule's deadline was an erroneous ruling or assurance by the District Court itself.") (citation and internal quotation marks omitted). Justice Ginsburg's concurring opinion in *Carlisle*, joined by Justice Souter and Justice Breyer, expanded upon that discussion: "This Court has recognized one sharply honed exception to [strict time prescriptions under the Federal Rules of Criminal Procedure for] * * * cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information." *Id.* at 435; see also *id.* at 435-436 (noting that *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-217 (1962) (*per curiam*), "held that petitioner's appeal be heard on the merits where petitioner had received from [the] trial court an improperly grounded 14-day extension of time to file his appeal").

By setting petitioner's Rule 35(c) motion for a hearing some four months after the fact, the district court effectively misled petitioner into believing that it retained jurisdiction to decide the matter. Indeed, the district court specifically indicated petitioner could appeal the motion's denial: "If there was an error in my analysis of the evidence that was presented with respect to the [amount of loss], that is a matter for the Fourth Circuit to deal with." App., *infra*, 23a. Moreover, the government did not suggest that the district court's ruling was untimely or unappealable until some two years after the fact, despite numerous opportunities to do so. Particularly considering the absence of Fourth Circuit precedent suggesting that Rule 35(c) imposed a jurisdictional seven-day limit, the district court's conduct, coupled with the government's acquiescence, warrants an extension of the district court's jurisdiction to decide the matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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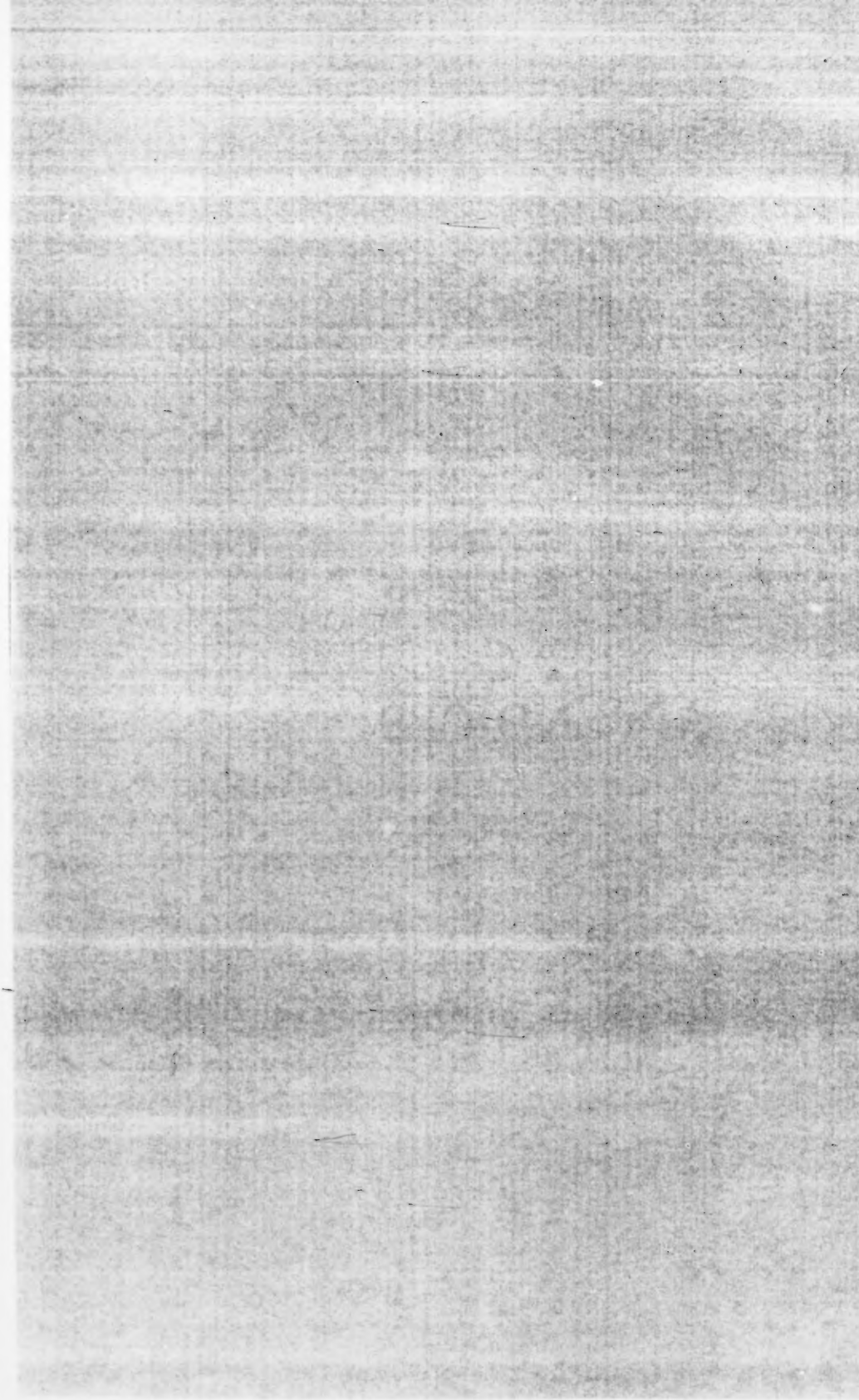
APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-4899

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

ANDREW G. SHANK,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the District of Maryland
No. CR-01-82-WMN

Before MOTZ, GREGORY, and SHEDD, Circuit Judges.

Dismissed by published opinion. Judge MOTZ wrote the opinion, in which Judge GREGORY and Judge SHEDD joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge.

Andrew G. Shank appeals the denial of his Fed. R. Crim. P. 35 motion. Because former Rule 35(c), now Rule 35(a),[1] imposes a seven-day jurisdictional time limit and the

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[1] The 2002 amendments to Rule 35 moved the substantive provisions of Rule 35(c), under which Shank filed the motion at issue here, to Rule 35(a). Fed. R. Crim. P. 35 advisory committee's note on 2002 amendments.

district court failed to act within that period, we dismiss the appeal.

I.

On February 2, 2002, Shank entered into a plea agreement with the United States Attorney's Office for the District of Maryland, in which he agreed to plead guilty to one count of bank fraud in violation of 18 U.S.C. § 1344 (2000). In the statement of facts accompanying his plea agreement, Shank admitted misrepresenting his assets and liabilities both to obtain various bank loans and in connection with his bankruptcy filing. As part of the plea agreement, for purposes of sentencing, the parties agreed that the total loss amount attributable to Shank's fraud was between $400,000 and $1,000,000. However, they specifically left open for determination by the court the loss amount caused to Mercantile Safe Deposit & Trust Company and Mercantile Mortgage Corporation (referred to jointly as "Mercantile").

At the June 25, 2002 sentencing proceeding, the district court determined the loss to Mercantile to be $305,000 and sentenced Shank under the United States Sentencing Guidelines to 41 months imprisonment. The judgment was entered on June 27, 2002.

On July 3, 2002, Shank filed a Rule 35(c) motion seeking to correct his sentence because "the amount of loss as to Mercantile was calculated incorrectly."[2] On November 1, 2002, the district court denied his motion, and on November 8, 2002, Shank appealed.

II.

The dispositive question presented here is whether former Rule 35(c), now Rule 35(a), divests a district court of

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[2] Shank also makes additional substantive arguments. But, because we hold that the district court lacked jurisdiction to act on Shank's motion when it did, we do not consider any of his substantive arguments.

jurisdiction to correct sentencing errors more than seven days after sentencing. A review of the history of the rule helps to resolve this question.

Before the Sentencing Reform Act of 1984 became effective on November 1, 1987, Rule 35 allowed a district court to "correct an illegal sentence at any time" and to "correct a sentence imposed in an illegal manner" within 120 days of certain triggers. *See* text following Fed. R. Crim. P. 35.

The Sentencing Reform Act deleted these provisions, however, and "the only circumstances in which a sentence could then be reduced were on remand after appeal or upon motion of the government to recognize a defendant's cooperation." 3 Wright, King & Klein, *Federal Practice and Procedure* § 581, at 627 (3d ed. 2004).

Then, in 1991, due in part to a decision of this court recognizing the "inherent power" of a federal court "to correct an acknowledged and obvious" sentencing mistake within the time allowed for filing a notice of appeal, *United States* v. *Cook*, 890 F.2d 672, 675 (4th Cir. 1989), Rule 35 was amended to include subdivision (c), which provided sentencing courts with a narrow window of seven days within which to correct "arithmetical, technical, or other clear error." Fed. R. Crim. P. 35 advisory committee's note on 1991 amendments; Wright, King & Klein, *supra*, § 585.2, at 646. "The authority to correct a sentence under this subdivision [wa]s intended to be very narrow and to extend only to those cases in which an obvious error mistake ha[d] occurred . . . ." Fed. R. Crim. P. 35 advisory committee's note on 1991 amendments.

The 1991 version of Rule 35(c), under which Shank moved for relief, provided in full:

> **Correction of Sentence by Sentencing Court.** The court, acting within 7 days after the imposition of

> sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Fed. R. Crim. P. 35(c) (2002).[3]

III.

Shank argues that "if a defendant timely invokes Rule 35 (i.e., within seven days), the district court is vested with jurisdiction to dispose of that motion," regardless of how long it takes the court to do so. Reply Brief at 1-2. Although there is a certain intuitive logic to this argument, we must reject it for several reasons.

First, the plain language of the rule—"[t]he court, acting within 7 days after the imposition of sentence"—makes clear that the court must act within seven days of sentencing, and that a timely motion by the defendant does not extend this period. Fed. R. Crim. P. 35(c) (2002); *cf.* Fed. R. Crim. P. 35(a) (2004) ("Within 7 days after sentencing, the court may correct a sentence . . . ."). Indeed, although the rules does not bar a motion by a party, it does not contemplate or require one. Rather, it provides that "[t]he *court*, acting within 7 days . . . may correct a sentence . . . ." Fed. R. Crim. P. 35(c) (2002) (emphasis added); *cf.* Fed. R. Crim. P. 35(a) (2004) ("Within 7 days after sentencing, the *court* may correct a sentence . . . .") (emphasis added). The significance of this language becomes even clearer in light of other provisions of Rule 35. *See* Fed. R. Crim. P. 35(b)(1) (2004) ("Upon the government's motion made within one year of sentencing . . . ."); Fed. R. Crim. P.

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[3] The wording of the current rule, which, as explained above, is now at Fed. R. Crim. P. 35(a), differs slightly from the old Rule 35(c):

> **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

Fed. R. Crim. P. 35(a) (2004). However, "[n]o change in practice is intended" by the slight change in wording in the new rule. *See* Fed. R. Crim. P. 35 advisory committee's note on 2002 amendments.

35(b) (2002) ("If the Government so moves with one year after the sentence is imposed . . . ."). In sum, the rule's language makes plain that "whether it acts on its own or on the suggestion or motion of a party, the court may only act within seven days after the imposition of sentence." Wright, King & Klein, *supra*, § 585.2, at 649.

In addition, the interplay between Rule 35 and Fed. R. App. P. 4(b) plainly indicates that jurisdiction to correct a sentence for arithmetical, technical, or other clear error under Rule 35 must lapse after seven days. Rule 4(b)(1) provides that "[i]n a criminal case, a defendant's notice of appeal must be filed" within 10 days of "the entry of either the judgment or the order being appealed." Fed. R. App. P. 4(b)(1). In this case, therefore, excluding weekends and legal holidays, *see* Fed. R. App. P. 26(a)(2), Shank had until July 12, 2002 to appeal his judgment of conviction.

Rule 4(b) also provides that if a defendant makes one of several enumerated timely motions—for a judgment of acquittal under Rule 29, for a new trial under Rule 33, or for arrest of judgment under Rule 34—his 10-day appeal period will not begin to run until after the court decides that motion. *See* Fed. R. App. P. 4(b)(3). Notably absent from this list in 2002, when Shank filed his motion, was Rule 35. *See* Fed. R. App. P. 4(b)(3) (2002). The 2002 amendments to the rule clarified that this omission was intentional—for newly amended Rule 4(b) provides: "The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction." Fed. R. App. P. 4(b)(5) (2004).

Thus, the only way that Shank could have preserved his appeal rights would have been to file an appeal from his judgment of conviction by July 12, several days after filing his Rule 35 motion. This conclusion is amply supported by the Advisory Committee Notes, which explain why the period of seven days was chosen. "The Committee contemplates that the court would enter an order correcting the

sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion." Fed. R. Crim. P. 35 advisory committee's note on 1991 amendments. The meaning is clear: should a court deny a motion under the seven-day rule, either explicitly or implicitly (by failing to act), a defendant still has ample time in which to appeal his sentence, since such denial will *always* occur before the 10-day appeal period has run.

Finally, we note that the vast majority of our sister circuits have specifically rejected Shank's view, instead holding, as we do, that the rule clearly imposes a seven-day jurisdictional limit. *See, e.g., United States* v. *Wisch*, 275 F.3d 620, 626 (7th Cir. 2001) ("The time limit is jurisdictional, and, furthermore, the motion must be *ruled on* by the district court within seven days, not simply *filed with* the clerk of court during that time.") (citation omitted); *id.* ("[A] court's failure to rule is functionally equivalent to an outright denial on the merits, thus making the judgment final on the date the district judge's power to alter the sentence expired." (internal quotation marks and citation omitted); *United States* v. *Austin*, 217 F.3d 595, 598 (8th Cir. 2000) ("The text of Rule 35(c) plainly commands the court to act within seven days, and thus after seven days the motion is effectively denied and any doubt concerning the finality of the sentence is ended."); *United States* v. *Morrison*, 204 F.3d 1091, 1092 (11th Cir. 2000) (holding that district court lacks jurisdiction under Rule 35 "to correct a sentence if the court sets the sentence aside within seven days of orally pronouncing it in open court but does not impose a new sentence until more than seven days have passed"); *United States* v. *Barragan-Mendoza*, 174 F.3d 1024, 1030 (9th Cir. 1999) (adopting view that "a district court's jurisdiction over a Rule 35(c) motion can last no longer than the seven days that the district court has to act

on the motion after the imposition of sentence"); *United States* v. *Blackwell*, 81 F.3d 945, 948 & n.4 (10th Cir. 1996) (noting that Rule 35(c)'s seven-day time limit is jurisdictional); *United States* v. *Lopez*, 26 F.3d 512, 519 n.8 (5th Cir.1994) ("We therefore agree . . . that the seven-day limit in Rule 35(c) constitutes a jurisdictional restraint on the district court's power to alter a sentence."); *United States* v. *Morillo*, 8 F.3d 864, 869 (1st Cir. 1993) ("[I]f a motion is timely made but is not decided within the seven-day period, the judge's power to act under the rule subsides and the pending motion is deemed to be denied as of that date.").[4]

If is for these reasons that we conclude that former Rule 35(c), now Rule 35(a), establishes a seven-day jurisdictional limit.

IV.

In this case, the district court effectively denied Shank's Rule 35 motion on July 5, 2002, seven days after sentencing (excluding the intervening weekend and legal holiday), leaving Shank seven more days (including the intervening weekend) to file his notice of appeal.[5] Because Shank did not note his appeal within this period, and because the district court lacked jurisdiction to resolve his Rule 35

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[4] Indeed, the 2002 amendments to Fed. R. App. P. 4(b) (discussed in text above) undermine the only two cases arguably adopting Shank's position. *See United States* v. *Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (holding that Rule 35(c) motion tolls period for filing appeal); *United States* v. *Corey*, 999 F.2d 493, 496 (10th Cir. 1993) (same).

[5] Rule 35's seven-day time period for correcting a sentence begins on the day the district court orally pronounces sentence, *United States* v. *Layman*, 116 F.3d 105, 108 (4th Cir. 1997)—in this case, June 25, 2002. Rule 4(b)'s 10-day time period for filing a notice of appeal begins on the day the judgment is entered on the criminal docket, Fed. R.App. P. 4(b)(6)—in this case, June 27, 2002.

motion when it did—five months after he filed that motion—we must dismiss Shank's appeal.[6]

DISMISSED

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[6] Shank additionally argues that principles of "equitable tolling" apply to save his untimely notice of appeal. He relies on *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990), in which the Supreme Court explained that "equitable tolling" can apply to suits "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Shank argues that by setting his Rule 35 motion "for a hearing nearly four months after it was filed, then ruling on that motion as if it had jurisdiction to do so, the district court and Appellee misled Appellant into believing he maintained the opportunity to file a timely notice of appeal from that judgment." Reply Brief at 3-4. This argument is frivolous. *Irwin* provides no authority for application of equitable tolling here. Rather, *Irwin* considered the filing requirement of an inapposite provision of federal law, 42 U.S.C. § 2000e-16(c), and *rejected* the petitioner's claim that this filing requirement had been equitably tolled. Moreover, and just as important, equitable tolling principles cannot, and do not, work to impose responsibility on the district court for Shank's failure to preserve his legal rights.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. WMN 01-0082

UNITED STATES OF AMERICA

VS.

ANDREW G. SHANK

Filed: November 1, 2002

ORDER

For the reasons stated on the record on November 1, 2002, it is this 1st day of November, 2002, in the United States District Court for the District of Maryland,

ORDERED:

1. That the Motion of Andrew G. Shank to Correct Illegal Sentence (Paper No. 44) was argued, and "DENIED"; and

2. That the Clerk of the Court MAIL or TRANSMIT a copy of this Order to counsel of record.

/s/

William M. Nickerson
Senior United States District Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2002 JUN 26 P 3:3'

United States District Court

District of Maryland

RECEIVED
U.S. MARSHAL
BALTIMORE MD
2002 JUN 27 P 1:0b

mjl

UNITED STATES OF AMERICA
AT BALTIMORE
BY _____ v _____ DEPUTY

ANDREW G. SHANK

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: WMN-01-0082

Defendant's Attorney: Kenneth W. Ravenell, Esquire

Assistant U.S. Attorneys: Robert R. Harding and
Christine Manuelian

THE DEFENDANT:

☒ pleaded guilty to count three (3ss) of the Second Superseding Indictment
☐ pleaded nolo contendere to count(s) _____, which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 1344	Bank Fraud	4/30/95	3ss
18 U.S.C. § 2	Aiding and Abetting	4/30/95	3ss

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____
☒ Counts 1ss, 2ss, 4ss, 5ss, 6ss, 7ss, 8ss, 9ss, 11ss, 12ss, 13ss and 14ss are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 165-42-1277
Defendant's Date of Birth: 8/13/49
Defendant's U.S.M. No.: 34546-037

Defendant's Residence Address: 3624 Bowser School Road
New Freedom, PA 17349

6/25/02
Date of Imposition of Judgment

6/26/02
WILLIAM M. NICKERSON
SENIOR UNITED STATES DISTRICT JUDGE
Date

Defendant's Mailing Address: Same

MICROFILMED
JUN 27 2002

Name of Court Reporter: Paul Mackare

40

BEST AVAILABLE COPY

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 41 months as to Count 3.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.
☐ as notified by the United States Marshal.

☒ The defendant shall surrender, at his own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☒ before 2 p.m. on July 25, 2002.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years .

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

1) The defendant shall not commit any federal, state or local crime.

2) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. §921.

3) The defendant shall not illegally use or possess a controlled substance.

4) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5) If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;
13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;
14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

C. SUPERVISED RELEASE
ADDITIONAL CONDITIONS

1. The defendant shall satisfactorily participate in a mental health treatment program approved by the probation officer, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

2. The defendant shall provide the probation officer with access to any requested financial information.

DEFENDANT: ANDREW G. SHANK **CASE NUMBER:** WMN-01-0082

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$ waived	$ 822,000.00

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

FINE

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☒ The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name and Address of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Allfirst Bank 25 South Charles Street Baltimore, Maryland 21202 Attn: Mr. Greg Barnes	$326,416.00	39.71%

(continued on the next page)

DEFENDANT: ANDREW G. SHANK

CASE NUMBER: WMN-01-0082

ADDITIONAL CRIMINAL MONETARY PENALTIES

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Sun Trust 919 E Main Street 9th Floor Richmond, Virginia 23219 Attn: Mr. James Acuff	$ 16,440.00	2.0%
Wachovia Bank, N.A. 422 Brushy Mountain Road Wilkesboro, North Carolina 28695 Attn: D. L. Wachter Special Assets Management	$ 227,611.00	27.69%
Mercantile Safe Deposit & Trust Mercantile Mortgage Corporation 2 Hopkins Plaza Baltimore, Maryland 21201 Attn: Mr. Michael Cordes	$251,367.00	30.58%

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WMN 01-0082

UNITED STATES

VS.

ANDREW SHANK

November 1, 2002

MOTIONS HEARING

BEFORE THE HONORABLE WILLIAM N. NICKERSON, UNITED STATES DISTRICT JUDGE

* * * * *

[2] THE COURT: Mr. Ravenell, I have your motion. I have reviewed it.

MR. RAVENELL: Thank you, Your Honor.

As the Court will recall, at the time of the sentence hearing in this matter there was the testimony of Mr. Cortis (phonet.) of Mercantile and there was extensive cross-examination by me, and follow-up by Ms. Manuellian with the witness.

I was trying to get the total crux of what this restitution amount and what was the loss to Allfirst, excuse me, to Mercantile, and one of the things that certainly became an issue is this Bankers and Barristers building as to whether, in fact, when this building, which was originally collateral

for the loan of $350,000 when Banker's Mercantile took that [3] building back, whether they took that as full satisfaction by the defendant of the loan.

There was some discussion, you may recall, about what they did with the building once they received it or took it back. How they turned it over to a charitable organization and what their credit was for tax purposes for the amount of loss, and we went around on that.

One of the things though that was interesting, at the time we did not have, and the documents they, in fact, took this building back in full satisfaction of the loan.

And quite frankly, one of the questions I asked in my point of memorandum. If you take the building back in full satisfaction of the loan, how can Mercantile allege that there is any loss for that building at this time for that loan when they took the building back, knowing, as Your Honor may recall, what the building was assessed at.

They, in fact, had the appraisals, they made the loan after having the building appraised, and they, in fact, used the same appraiser Mr. Shank used when they decided to have the building appraised for their purposes for donation to the charitable organization.

And once we look now, Judge, at the situation [4] that they, in fact, did take the building back as full satisfaction for the loan including $350,000. Knowing all the circumstances, you can't now use that as a basis to calculate the losses in this matter.

The Court will recall one of the things we contested in this matter, the amount of loss to Mercantile, and that was the main issue that was left open for the restitution hearing and the purpose of sentencing, as well because that dollar figure plays an important part in the amount of loss for restitution purposes and the amount of loss for sentencing purposes.

After the hearing, Your Honor concluded that there was a loss on that loan of $350,000 even though the bank took that building back, and later donated it to charity for a certain figure. What the Court didn't have before you, was a document which is our Exhibit 1 to this motion indicating that the building, in fact, had been taken back as full satisfaction for the debt of the loan of $350,000 Your Honor.

As you recall, one of the arguments I made to the Court then, there may be some double dipping on the tax side for Mercantile. What he didn't have was the document in the government's possession and seized from Mr. Shank during a search of his home and attached [5] business.

As I noted, Your Honor, we were not aware of the testimony Mr. Cortis (phonet.) would be giving on that basis, because the government indicated merely Mr. Cortis would be testifying and he would be testifying basically on the discovery, and that was not a document in the discovery.

Shortly afterward, we learned of Cortis' testimony. We then were able to get the document and bring it to the Court and show there was, in fact, information given to the Court incorrectly that led to what we believe to be an illegal sentence because the loss calculation was, in fact wrong, and I think if the Court accepts that, the building was taken in full satisfaction for the loan, $350,000 loan made to Mr. Shank, there would have to be a reduction at least, of the $350,000 Your Honor found to be the loss to Mercantile in this matter, Judge.

Thank you.

THE COURT: Mr. Harding.

MR. HARDING:

Your Honor, Thank you.

Your Honor, not that this is a terribly important point, but I want to call the Court's attention to the context in which Mr. Cortis made this [6] statement about full satisfaction of the debt. It actually comes up in the context

of a hypothetical that Mr. Ravenell had raised with him in the transcript which he has attached to his pleading at the bottom of page 15.

Mr. Ravenell asks, and then you take that property, if you don't pay - - if I don't pay you back and you sell it, are you telling me if you sell it I still owe the hundred dollars. What he is talking about is, I should have started further back, a hypothetical about purchasing a car at line 17 on page 15.

He says now, when you lend or give a loan you take collateral just in case the person defaults on a loan, is that correct? Answer: As an additional safeguard, yes. Question: So if I want to borrow a hundred dollars from you and I give you my car, you have that in case I don't pay you the hundred dollars back, correct? Answer: Correct. And then you take that property, if I don't pay you back and you sell it, you are telling me if you sell it I still owe the hundred dollars? Answer: Not if I take the car back in full satisfaction of your debt. The difference between that hypothetical and the case we have before us is striking, Your Honor.

[7] The fraud scheme is not really in dispute in this case. It is all laid out in the statement attached to the plea agreement. Mr. Shank essentially defrauded a number of banks by exaggerating his assets and minimizing his liability on the loan application. They, therefore, made loans to him that they would not have done otherwise.

He then filed for bankruptcy and defrauded both his creditors and the Bankruptcy Court by filing new statements exaggerating his liabilities and minimizing his assets, so that in the the bank loan applications, he appeared to have a net worth of a positive three million dollars, and in the bankruptcy filings he appeared to have a negative net worth of five million dollars.

The creditors in a bankruptcy proceeding have a sort of gun held to their head. They know the debts will be dis-

charged in the bankruptcy. They, therefore, in this case and in typical bankruptcy cases, enter into a sort of compromise. They agree to accept partial repayment.

That is what the creditors did in this case. There was a creditors pool, but actually involved pooling together most of the assets that the Shanks made available to the creditor's pool, and this would [8] have been divided up, and the creditors got some fraction of what they were owed by the Shanks.

And the deal whereby Mercantile bank took the Bankers and Barristers building was a similar sort of arrangement. They agreed to a compromise knowing that if they did not, it didn't really matter because the Bankruptcy Court was going to discharge the debt.

This document that Mr. Shank has brought to the Court's attention in his motion to correct the sentence is dated November of 1996. That is about a year and a half after the bankruptcy was filed and even after the confirmation of the joint plan to resolve the bankruptcy, so the bank knew it entered into this deal to take the Bankers and Barristers building that it was basically between a rock and a hard place.

It had to accept much less than it was owed in recompense. The fact there is this language in here about full satisfaction is completely meaningless though, from the standpoint of what this Court orders in restitution that Mr. Cortis testifed to as to what the bank lost.

The bank lost $350,000 he testified. I think the Court adopted a lower figure as Mr. Ravenell just said. The loss that the Court attempts to redress in a restitution order is the loss sustained by each victim [9] as a result of the offense according to 18 USC, Section 3636a1b1.

The law does not, as I said in my written response in this case, Your Honor. The law does not instruct a sentencing

court to return the victim to a compromise the victim accepted before the - -

MR. RAVENELL: Your Honor, as I said, this really is a simple matter. What Mr. Harding says, whether there was a complicated fraud scheme, whether it was or not, the loss issue is not controlled by the fraud scheme. The Court still has to find what was the loss to Mercantile.

What we agreed to in the plea agreement is that there was a dispute about the loss amount to Mercantile of the alleged $400,000 that the government said was attributable. This was part of the plea agreement. It doesn't change anything.

We have always disputed the amount of loss to Mercantile. And what we have, Judge, the situation where we don't need to look at the scheme itself. Assume the scheme to have been a crime and assume that he has pled guilty to, which he has, the question now is determining the amount of loss.

And what you look at is, what is the loss. The courts have to determine this every day, what the [10] amount of loss is. Sometimes it is more difficult than others to figure out what the dollar figures are, and we sometimes need testimony.

In this case though, Judge, what Mr. Harding says to you on some points are just inaccurate. For example, he says that Mercantile took a partial payment by taking this building back. They did not, they did not. There is absolutely nothing in the record to support it.

If the Court were to review the bankruptcy plan that Mr. Shank, Mr. Shank's bankruptcy plan, you will see that the information Mr. Harding just related to you is inaccurate.

He said to you that Mercantile was asked to discharge their secured debt. Absolutely not. Mr. Shank never asked any secured lender to discharge any secured debt. His bankruptcy was only to discharge unsecured debts. Every

secured debt he affirmed and acknowledged that he owed that, and in the Mercantile situation, Mercantile who is to accept the property that they had as collateral, and that is why the hypothetical I posed was simple.

If I borrow a hundred dollars from you and you have my car as collateral, and if I can't pay, if I pay you the hundred dollars back, do I get my car [11] back? The answer should be yes. The answer from Mr. Cortis was yes.

In this situation, if you lent me fifty thousand dollars and you have my building as collateral and you choose to accept that building as collateral on the secured debt as full satisfaction, how then do I owe you any money, particularly since there was never an effort to discharge that debt in bankruptcy, not once, or not any secured debt did Mr. Shank attempt to discharge in his bankruptcy proceeding. he chose to have discharged the unsecured debts and that is what was in the bankruptcy pool.

This building never went into the bankruptcy. In fact, what happened was the other creditors agreed Mercantile could keep this building and did not make it part of the pool for the bankruptcy proceedings. So what we have, Your Honor, Mr. Harding then says well, what you look at for restitution is the amount of loss to all of the parties.

Well, if you recall the breakdwon that the government gave you for restitution, they said of the $822,000 you found to be the loss, there were four victims, that they wanted the money apportioned to. 39.71 percent went to Allfirst, which came to $302,416. Two percent, I believe to Sun Trust which [12] was $16,440. 17.69 percent to First Union. $227,611, and then 30.88 percent to Mercantile at $251,367.

So there was no, while there is a great number here, we just have all these victims, and this loss is somehow attributable to all of those possible victims in the universe. No. This was a finite number broken down between four different companies or entities, and Mercantile was one that

received the second highest figure of 30.88 of $251,000 of the restitution order, of the $822,000 the Court found to be the actual loss and restitution in this matter.

But before the Court can make the breakdown figure of what each person gets as a portion of the amount, there needs to be a correct calculation of the loss amount, and what we are arguing, Your Honor, there was not a correct calculation of the loss amount, and it is clear error and it is also mathematical. It really is adding up the numbers and getting the numbers right, and this Court does have jurisdiction for those reasons, Judge.

THE COURT: All right.

I simply disagree on the last point. I think Mr. Harding is correct. There is a jurisdictional issue. This is not an arithmetical mistake, assume there was a mistake. If there was an error in my [13] analysis of the evidence that was presented with respect to the finding I made as a result of that analysis, that is a matter for the Fourth Circuit to deal with. I don't view this as an arithmetical mistake.

I made a finding on the basis of all the evidence that was presented, and with regard to the Mercantile loss, that the bottom line was a $350,000 loss, which included $65,124 and some cents that related to a line of credit loss to the bank. $320,000 related to the building that we are talking about, which would have been $385,124.

I credited an $80,000 figure, I am looking at my notes, that had to do with some securities that were in issue. The bottom line came then to be 305,000. It may well be the evidence presented doesn't support that. I believed then that it did and believe now that it does, but I don't believe that we are here properly on the defendant's Motion to Correct an Illegal Sentence, so I am going to deny the motion on that basis.

MR. RAVENELL: Thank you for hearing us, Your Honor.

THE COURT: All right. I guess we will have to await further word from the government with respect [14] to matters that Mr. Harding referred to.

MR. HARDING: Thank you, You Honor.

THE COURT: Thank you, counsel.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CRIMINAL No. WMN 01-0082

UNITED STATES OF AMERICA

VS.

ANDREW SHANK,
Defendant

Filed: November 8, 2002

NOTICE OF APPEAL

The Defendant, Andrew Shank, through his counsel, Kenneth W. Ravenell and Schulman, Treem, Kaminkow, Gilden & Ravenell, P.A. files this Notice of Appeal of the ruling of the Honorable William M. Nickerson on November 1, 2002 denying the Defendant's Motion to Correct Illegal Sentence.

Respectfully submitted,

/s/

Kenneth W. Ravenell
Joshua R. Treem
Schulman, Treem, Kaminkow,
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